IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE

LETTERS PATENT APPEAL NO. 315 OF 1998

IN

FIRST APPEAL NO. 1244 OF 1998

IN

SUIT NO. 8719 OF 1968

1. Nariman Nassarwanji Dubash

2. Mrs. Homai Nariman Dubhash, both residing in a room of Flat No. 11, 2nd Floor, Billimoria Building, Sleater Road, Grant Road, Bombay 400 007. ... Appellants

Vs.

Clover Co-operative Housing Society Limited, a Society registered under the Cooperative Societies Act having its registered office at 27-A, Noshir Bharucha Marg, Bombay 400 007. ... Respondent

Ms. Kiran Bhagalia with Ms. Soanli Kunekar i/by M/s. Haresh Mehta & Co. for appellants.

Mr. A.A. Sayed for Respondents.

CORAM : F.I. REBELLO &
ANOOP V. MOHTA,JJ.
DATED : AUGUST 18, 2004

ORAL JUDGMENT (Per F.I. Rebello,J.):

1. The Respondent was substituted as Plaintiff for one Mrs. Pirojbai Dhanjishaw Poonawala who had initially filed the suit against the appellants herein being S.C. Suit No. 8719 of 1968. By

Judgement and Order dated 8th January, 1987 the trial court was pleased to dismiss the suit. Being aggrieved, the Respondent herein preferred an appeal before this court. The learned Single Judge of this Court after hearing the parties, was pleased to allow the appeal in terms of Prayer Clause (a) and (b). In other words suit preferred by the respondent herein was decreed in First Appeal No. 1244 of 1988. The appellants herein preferred Letters Patent Appeal before this court which was numbered as L.P.A. No. 315 of 1998. The appeal came to be allowed by order dated 9.6.2000. The learned Appellate Bench of this Court was pleased to set aside the Judgement of the learned Single Judge dated 15.10.1998 and restored the order passed by the trial Court. The Respondent against the said order preferred Special Leave Petition before the Apex Court. The Special Leave Petition was allowed and the matter was remitted back to this court, to reexamine the same afresh on merits as expeditiously as possible. While setting aside the order, the Apex Court was pleased to observe as under :

> "We have gone through the judgements of the trial Court, First Appellate Court as well as that of the Division Bench on the LPA side and

we are of the view that the Division Bench of the High Court, except to consider this aspect of the matter as to whether there was a licence in favour of the respondents or not did not consider the other questions arising in the matter nor did it firmly consider the nature of the licence in favour of the respondents to come to a conclusion one way or the other when there are divergent findings by the trial Court and the First Appellate Court the Division Bench ought to have considered several aspects arising in the case."

2. We have heard the learned counsel for the parties. A few facts will have to be set out for the purpose of deciding the controversy which has arisen in the matter. Mrs. Pirojbai Dhanjishaw Poonawala who was the erstwhile owner of the property had created a tenancy in favour of one Dhanjishaw. Shri. Dhanjishaw along with his son Shavakshaw entered into an agreement with the appellant No. 1 on 30.4.1960. In terms of the said agreement the appellant Nariman Dubhash along with his wife appellant No. 2 and servant were allowed to stay as paying guest at the premises

occupied by Dhanjishaw and to pay Rs.65/- per month inclusive of all charges. The paying guest was entitled to use one room with bath room absolutely. The furniture consisting of one cabinet was to remain in the room occupied by the Paying Guests. The period of Paying Guests accommodation was for three years from 1st May, 1960 and during the period of occupation the paying guests were at liberty to vacate the room on giving one month's notice but if the paying guests were made to vacate the room during the said period of three years inspite of paying the paying guests charges regularly Dhanjishaw Hormasji Shunting Master (Mistry) and his son Shavakshaw Dhanji Shunting Master) had to pay damages caused to Nariman Nusserwanji Dubhash on such vacation by them. There was a clause providing that the agreement be renewed by mutual consent only after the expiry of the said period of three years. Dhanjishaw expired on 16.5.1960. The record would disclose and it will be adverted to latter that the tenancy was continued in favour of Bai Aimai, the widow.

3. Mrs. Poonawala filed the suit against Bai Aimai for eviction on the ground of failure to pay rent. That suit came to be decreed by the Small

Causes Court by Judgement dated 3.5.1962 in R.A.E. Suit No. 2882 of 1961. Bai Aimai preferred an appeal being Appeal No. 255 of 1962. That appeal came to be dismissed by judgement dated 4.11.1965. Mrs. Poonawala filed proceedings for execution wherein present appellants took out Obstructionist Notice which came to be disposed of by order dated 5.9.1968. The Obstructionist Notice filed by the appellants herein was allowed. While so allowing the obstructionist notice, the learned court was pleased to observe that it appears that the appellants were occupying the premises more likely as sub tenants. On the death of Dhanjishaw who expired in May, 1960, the legal heirs left behind were Bai Aimai and Shavakshaw. The suit was filed only against Bai Aimai i.e. one of the heirs. The court further observed that no explanation was given as to why the tenancy was transferred in the name of only one of the defendants Bai Aimai and in the absence of any such explanation it was required to be held that Shawakshaw had equal interest in the tenancy inherited by him to the Defendant. The same remained unaffected inspite of the decree against one of the heirs i.e. the Defendant. Referring to the agreement, the court held the agreement is binding on Shavakshaw and that at the

time of execution of the document he was not a tenant. He became tenant immediately thereafter on account of the death of his father and therefore, the agreement with all its incidents e.g. the creating of sub tenancy would be binding on him since he became tenant and therefore, obstructionist would be at the best a tress passer according to the case of the Plaintiff in R.A.E. Suit and not at all persons claiming under the judgement debtor.

4. It is only after this, that the suit was filed by the owner Poonawala against the Appellant in which a declaration was sought that the defendants are tress passers in the suit premises and for a decree directing the appellants to deliver vacant possession of the suit premises and further to pay compensation. As noted earlier the name of the Original Plaintiff Mrs. Poonawala was substituted by that of the present respondents, in view of the subsequent events namely Mrs. Poonawala transferring the interest in the land and the building in favour of the society. The appellants herein first filed written statement on 20.3.1969, wherein various objections were taken including as to jurisdiction. In so far as the merits are

concerned in Paragraph 5 it was averred that late Dhanjishaw and his son Shavakshaw with the consent or knowledge of Plaintiff Poonawala had created sub tenancy in respect of one room with attached bath room and separate entrance in favour of the appellants. It was further pleaded that after the death of Dhanji Shah and ignoring the claim of Shavak Shaw, Poonawala transferred the tenancy rights in the name of Bai Aimai,. At this stage itself, it may be noted that in Paragraph 3 of the plaint, the Original Plaintiff had pleaded that Shavakshaw by letter dated 15.3.1961 addressed to Poonawala relinquished the rights and interest in the tenancy rights of the flat and had requested the original Plaintiff to transfer the rent receipts of the said flat in the name of his mother Aimai, as heir and legal representative of the deceased Dhanji Shah. Supplementary written statement thereafter came to be filed on 29th October, 1986 wherein again apart from preliminary objection, it was averred in Para 4(a) that the appellants were sub tenants of one Dhanjishaw Shunting Master. That Bai Amai and Shavakshaw were at the time of his death of the said Dhanjishaw residing with him as members of his family and hence became the tenant of the suit premises under

provisions of Section 5(11)(c) of the Bombay Rent Act. It was further averred that on the death of Dhanjishaw, rent was being paid to both Aimai and Shavakshaw jointly. It was further averred that the tenancy of Shavakshaw was never determined nor any suit is filed against him with the result that in law the tenancy of the said Shavakshaw subsisted and the defendants continued as the sub tenants. It was therefore, pleaded that they were not trespassers but claiming sub lease through Shavakshaw, one of the lessees whose tenancy was never determined.

5. On behalf of the Respondent, Yezdi Phiroze Pundol was examined as Chief Promoter. In the course of his evidence, following documents were exhibited.

1) Judgement dated 3.5.1962 in R.A.E. Suit No. 2882 of 1961,

2) Judgment dated 4.11.1965 in Appeal No. 255 of 1962,

3) Order dated 5.9.1968 in Obstructionist Notice No. 423 of 1968.

6. These orders were marked Exh. A by consent. Copy of the agreement dated 30.4.1960 between Appellant No. 1 and the Original Tenant Dhanjishaw was marked as Exh. B. Reference is made to some documents in the proceedings before the Registrar of Cooperative Societies which are really not relevant. In his examination he has deposed that one Masuda Khan was in possession of the rent receipts and therefore, she was admitted as one of the members. She was also issued share certificate. The application of the appellants for being admitted as member was rejected. This is the only evidence led on behalf of the respondents.

7. On behalf of the appellants, appellant No. 1 examined himself, wherein he has deposed that the Original tenant has agreed to give him portion of flat which he was occupying which had separate entrance and sanitary facilities and it is a fully self contained block. That the appellant was residing therein since 1.5.1960 till date and the agreement of 30.4.1960 was executed. Receipt dated 7.12.1960 which according to appellant No. 1 was issued by Shunting Master was exhibited as Exh. 7. He has relied on the receipts for the period of

1966 to 1967 to prove that even after expiry of the original period his possession was continued. These receipts are marked Exh. 8 collectively. The only evidence in examination in chief reads as under :

> "After his death his widow and son used to issue the rent receipts."

. He has further deposed that in 1969-70 Masuda Khan came in Flat No. 11 and that she was not occupying any other portion besides flat No. 11. In the cross examination, only suggestion put to the witness was that the appellant was an unauthorised occupant in respect of the portion of the flat No. 11 i.e. the suit premises.

8. As noted earlier the trial court by the judgement of 8.1.1987 while answering issue No. 2 which was whether the Plaintiffs prove that the Defendants are trespassers in respect of the suit premises, held in the negative i.e. against the respondents and in favour of the appellants herein. The trial court recorded a finding that the appellants herein had exclusive and full control

over the premises and though the document is styled as Paying Guest, still intention of the parties was to create tenancy. The learned Trial court relying on the agreement Exh. B held that by virtue of the agreement appellants were given absolute possession of room of Flat No. 11 and bath room. The second condition imposed was to give one months notice in case of vacating the room. The court held that this condition was abnormal because Paying Guest never required to give any notice before vacating the room. Thirdly held that if the appellants were asked to vacate the room, then Dhanjishaw and Shavakshaw had agreed to make good the loss caused to the appellant. The court held that such condition could never be imposed on the Paying Guest. The court further held that the Original Suit filed by Poonawala was only against the widow and not against Shavak Shah or against the appellants herein. From this evidence, the court held that the exclusive possession was given to the appellants who continue to reside for years together without any interruption. The court held that the appellants would be protected by the provisions of the Bombay Rent Act and on the findings recorded on Issue No. 2 dismissed the suit.

9. The learned Single Judge of this Court while considering the appeal, observed that though the appellants have concluded sub tenancy was created by agreement of 30.4.1960, the appellant No.1 when he entered into the witness box made no such claim in his examination in chief. As he made no such claim, he was not cross examined on that aspect of the matter. The court further held that from the cross examination it would show that the appellants had failed to make out a case of sub tenancy or the case that the agreement dated 30th April, 1960 does not disclose the true relationship between the parties to that agreement and as such the trial court was not justified in examining the case of sub tenancy. The court observed that the trial court held that what is created by the agreement dated 30th April, 1960 was a sub tenancy and not a paying guest arrangement because according to the trial court, the defendants were in exclusive possession of the room. The learned Judge placing reliance on a judgement of the Apex Court in the case of Surendra Kumar Jain Vs. Royce Pereira, AIR 1998 SC 394 took a view that the trial court was not justified in holding that even though the agreement described defendant as Paying Guest, the

Appellants in law and fact were sub tenants. The learned Single Judge held that considering the material on record, the appellants were residing as Paying Guest and for that reasons allowed the appeal and directed the eviction of the appellants.

10. At the hearing of this appeal, on behalf of the appellants, their learned counsel contends that the agreement dated 30.4.1960 considering the averments and the evidence that has come on record would indicate that licence was created in favour of the appellants and considering the provisions of the Bombay Rent Act, they would be deemed tenants and as such can not be evicted.

. On the other hand on behalf of the Respondents, their learned counsel contends what the court must consider is the material on record. If the material on record is considered, it was clear that the intention of the parties was that the appellants were to reside in the premises as Paying Guest. The documentary evidence supports this claim of the Original Plaintiff and not of the respondents and for that view of the matter the order of the first appellate court should not be interfered with.

11. Having regard to the above, and the remand by the Apex Court, the question that arises for determination is whether the appellants herein were able to establish that they were residing as sub lessees and or licensees in the suit premises and on that count the order of the learned Single Judge is liable to be set aside.

. From the earlier part of the discussion what has emerged is that Dhanjishaw was original tenant who along with son Shavakshaw entered into an agreement with appellant No. on 30.4.1960. On 30.4.1960, Shavakshaw had no right or legal interest in the property. Therefore, for all purposes, the agreement was entered into between appellant No. 1 and late Dhanjishaw. Dhanjishaw expired on 16.5.1960. Considering the provisions of Section 5(11) of the Bombay Rent Act, it is the legal heirs set out therein who would be the tenants. In other words, on the demise of Dhanjishaw, Baimai widow and shavakshaw by operation of law would be statutory tenants. In the pleading in the plaint itself, the respondent had pleaded that Shavakshaw had surrendered the tenancy in favour of his mother Baiamai. This averment was not controverted by the

appellants in their written statement. On the contrary from the pleadings of the appellant, they did admit in Paragraph 5 that the landlord transferred tenancy rights in the name of the widow of the said Dhanjishaw namely Baiamai ignoring the claim of Shavakshaw. What therefore, becomes clear is that after 15.3.1961 in terms of the pleading in the plaint, it is Baiamai who alone would be tenant of the premises. The other important aspect of the matter from the agreement is that at the time when the appellants were inducted as Paying Guest, Dhanjishaw was occupying remaining premises which can be seen from the Paragraph 1 of the agreement. The next relevant documentary evidence on record for the purpose of considering the intention of the parties would be receipts Exh. 7 and 8 collectively. Exh. 7 is the receipt dated 7.1.1960 issued by Dhanjishaw and it reads as under :

> "Received from Nariman Nusserwanji Dubash the sum of Rs. 65/- (Sixty Five) being the Paying guest charges for the month of December, 1960 for one room and bath occupied by him as a paying guest for the period of three years in Flat No. 11, Sleater Road, Plot NO. 4, 2nd

Floor."

. It was the case of the appellant that the subsequent receipt after the death of Dhanjishaw were issued by both Bai Aimai and Shavakshaw. This is belied by the documentary evidence. Exh. 8 collectively was produced by the appellant to prove that he was allowed to continue to reside in the premises even after the original term of agreement had come to an end. The receipts are signed only by Baiamai and not Baiamai and Shavakshaw as was pleaded and contended on behalf of the appellants. In the receipts of 1.11.1966 and 4.10.1967 the sum received is described as Paying Guest Charges.

. The other documentary evidence which has come on record are the judgments in R.A.E. Suit, in the appeal and the Obstructionist notice.

12. Before addressing ourselves further, we may note some provisions of the Bombay Rent Act.

. Section 5(4)(a) defines licencee as the person who is in occupation of the premises or such part, as the case may be, under a subsisting agreement for licence, given for a licence fee or charge but

does not include a paying guest.

. Section 5(6A) defines "Paying guest" as a person, not being a member of the family, who is given a part of the premises, in which the licensor resides, on licence. A look at these definitions would mean therefore, that the licensor must be in occupation of the part of the premises when the licence is created in favour of the paying guest.

. Section 2(11) defines tenant to mean any person by whom or on whose account rent is payable for any premises and includes :

(a) such sub tenant and other persons as have derived title under a tenant before the 1st day of February, 1973.

. It may be mentioned a this stage that in the records of the appeal and the written arguments filed on record it was sought to be advanced that the licence in favour of the appellant was terminated by Baiamai by notice of 25.4.1968. It may be made however clear that this notice has not come on record as an Exhibit nor any evidence led and therefore, no note can be taken of the said

notice or contention. From these definitions, it becomes clear that a Paying guest is also a licensee, but a licencee residing as a Paying guest does not fall in the definition of licensee as defined under Section 5(4)(A). A paying guest licence can be created only if the licensor himself is residing in the premises. Such a paying guest is not entitled to the benefit under Section 15A of the Act who is entiteld is only a licensee who falls under Section 5(4)(A).

13. The issue of who can be said to be a paying guest under the provisions of the Bombay Rent Act came up for consideration before the Apex Court in the case of Surendra Kumar Jain (supra). The contention of the appellant therein was that the licence was created in favour of the appellant and by virtue of the provisions of the Rent Act, he would be deemed tenant and would be entitled to protection. The contention of the Respondent was that the appellant was allowed to reside as paying guest. The trial court in that case considering the language of section 5(6A) and the definition of Paying Guest, held that the licensor must reside in the very room in which right was created in favour of the paying guest. This was negatived by the

Apex Court in the following words :

> "This view according to us, is not warranted by the words in Section 5(6A) defining "paying guest. In our opinion, all that is required to make a licensee answer the description of a "paying guest" is that the licensor also resides in the premises of which a part is in the possession of the paying guest ....."

. The Apex Court then noted that the position of Paying Guest in India is similar to the position of a "lodger" in England. The court then proceeded to hold that if the part is in the use of the "Lodger" and the owner retains the control of the whole house, that is sufficient. The fact that its control in fact, was not exercised by the owner does not prove that he had no control, for many rights exist which nevertheless are not asserted until occasion arises to put them into force. If the de jure control exists, there need not be de facto control, where the owner under an agreement allowed the respondent to use two rooms and kitchen, while the owner was also residing in the same premises, it was held to be a paying guest arrangement and not an agreement of tenancy. The

Court approved the judgement of this court in Clive Everard R. Williams Vs. Raju B. Kripalani 1993 Bom.R.C. 35 where a licensee was occupying the kitchen and room but the keys were held in duplicate both by the licensee and the licensor who occupied the remaining part of the flat (i.e. the licensor retained control), it was held to be a case of paying guest arrangement. Apart from that the agreement has to be considered to find out as to whether the documents purport to be an agreement of sub lease or paying guest arrangement or for that matter even licensee.

. The trial court proceeded solely on the basis of agreement of 30.4.1960 without considering Exh. 7 and Exh. 8 collectively. In any such agreement intention of the parties is a material and relevant factor to be taken into consideration. The agreement Exh. D shows that what was given was accommodation as paying guest. This becomes clear from the fact that the licensor was staying in the rest of the premises not let out to the paying guest and what the paying guest was paying was consideration as paying guest. It was not the stand of the Appellant that the agreement was to camouflage the real nature of the contract. There

was a cupboard of the licensor in the premises. The next documentary evidence in form of receipt Exh. 7 shows that the money was received as paying guest. Exh. 8 collectively are two receipts one of the year 1966 and the other of the year 67 which are after the death of Dhanjishahw and after the expiry of the original period of three years, which also show that the consideration received was as paying guest.

. Against this, the contention of the appellant is that there cannot be paying guest for such a long duration and apart from that there was exclusive user of the premises. It may be noted that the landlord had filed proceedings for eviction of Bai Aimai and had succeeded in getting a decree for eviction on 3.5.1962. The appeal preferred was dismissed on 4.11.1965. In the obstructionist notice, the stand of the Appellant was that he was claiming through Shavakshaw.

. As we have noted earlier in the judgement in the Surendra Kumar Jain (supra), the appellant No. 1 along with his wife and servant were allowed to reside in a part of the premises occupied by the

Original tenant. The Paying guest was residing in the premises from 1973. Proceeding for his eviction were filed in the year 1979. This occupation of a period of six years had no bearing on the nature of the occupation in consdiering the test of finding out the nature of occupation. The Apex Court placed no reliance on the occupation of six years. In the instant case, the lawful occupation at the highest would be between May, 1960 till the decree for eviction on 3.5.1996. In the instant case as noted above, the learned Single Judge noted that it was the case in the pleadings by the appellant that appellant NO. 1 was sub lessee but had led no evidence on that count except for the deposition that the appellant was in exclusive possession. The learned Single Judge was right in holding that in the absence of leading evidence on sub tenancy, there was no question of cross examining the witness on evidence which had not been led. The plea by the Appellant that they were sub tenant has not been proved. On the contrary from the order of remand from the Apex Court, it is clear that the Appellants are claiming as licensee who were entitled to protection under Section 15A of the Act. Mere possession of a part of the residence, may be in a distinct portion

having independent access, kitchen and toilet by itself cannot result in a sub lease.

15. The other question to be considered is whether Dhanjishaw and or subsequently Bai Amai had created a license in favour of the Appellant more so considering the order of the Apex Court whilst remitting the matter. It is no doubt true that the agreement was valid for a period of three years. But material on record has to be considered. A decree for execution against the tenant was ordered on 3.5.1962. The paying guest licence created in favour of the appellant would therefore, come to an end from that day. The continuance of the Appellant in the premises would thereafter, be merely as tress-passer. The mere fact that thereafter the Appellants continued to reside would not create any legal right in them. The period of lawful residence would be co-extenstive with the lease in favour of the tenant. In the light of that, we find no reason to interfere with the Judgment of the learned Single Judge. Appeal dismissed.

16. The learned counsel for the appellant seeks

stay of the order as they want to approach the Apex Court. Considering the fact that the appellants were residing in the premises and are still residing there and though the counsel for the respondent opposes the request, we think it proper that the Respondent for a period of eight weeks from today, take no steps to execute the order. It is however, directed that during this period, the respondents shall not create any third part interest and shall not part with the possession of the suit premises in favour of anyone other than respondents.

. Personal Secretary to issue authenticated copy of this order.

(F.I. REBELLO,J.)

(ANOOP V. MOHTA,J.)